U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 16 May 2006

CASE NO.: 2005-LHC-1743

OWCP NO.: 08-120151

IN THE MATTER OF

WILLIAM E. SELF, JR.,
Claimant,

v.

SNEED SHIPBUILDING,
Employer

and

AMERICAN HOME INSURANCE CO.,
Carrier

APPEARANCES:

JOHN D. MCELROY, ESQ.
On behalf of Claimant

TALLY R. PUGH, ESQ.
On behalf of Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by William E. Self,

Jr. (Claimant) against Sneed Shipbuilding (Employer), and American Home Insurance Co. (Carrier). The formal hearing was conducted in Beaumont, Texas on January 24, 2006. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-16, and Employer's Exhibits 1-26. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of alleged injured/accident is July 16, 2001.
2. The original injury occurred in the course and scope of employment.
3. An employer/employee relationship existed at the time of the alleged accident.
4. Employer was advised of the injury on July 17, 2001.
5. Notice of Controversion was filed October 6, 2003 and December 9, 2004.
6. An informal conference was held February 15, 2005.
7. The average weekly wage at the time of injury is disputed.
8. Nature and extent of disability is disputed:
   (a) Temporary total disability July 17, 2004 to September 24, 2004;
   (b) Temporary partial disability is disputed; and
   (c) Permanent total disability is disputed.
9. Benefits for TTD were paid from 7/17/2001 to 11/29/2004 (176 weeks at $233.46 per week for a total of $41,088.96).
10. Date of maximum medical improvement is disputed.

[1] The parties were granted time post hearing to file briefs. Upon request by Claimant, time to file briefs was extended to April 28, 2006. Claimant, Employer and the Director for the Office o f Workers' Compensation Programs filed briefs in this matter.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

Issues

The unresolved issues in this proceeding are:

1. Whether Claimant has reached maximum medical improvement.
2. Nature and Extent of disability.
3. Entitlement to Attorney's fees.
4. Employer and Carrier's entitlement to Special Fund relief pursuant to 33 U.S.C. § 908(f).
5. Reasonableness and necessity of medical treatment provided to Claimant.
6. Average weekly wage.
7. Interest, if any, on past due compensation.

Statement of the Evidence

William E. Self

Claimant testified that he completed school up to the tenth grade, and then dropped out. He eventually obtained his GED; however, he has not gone to college and has no licenses or certifications. Claimant stated that he was born and raised in Orange, Texas. Claimant currently lives with his brother-in-law[3] on Abita Road, Orange, Texas. Prior to the accident Claimant also lived on Abita Road, but he lost that house because he could not make the payments.

Claimant described his employment history and stated that he had worked for Betts Laboratory, an industrial water treating company, for about 26 years until 1997. Claimant stated that currently, he cannot go back to work for Betts because they now require some college education. After Betts, Claimant worked for various ship outfitters. The work he did at these companies, including Employer, was similar in nature.

Claimant began working as a shipfitter for Employer in May 2001 and was making between $11.35 and $11.50 an hour. Claimant explained that the job of a shipfitter includes cutting out large sections of steel and replacing it with good steel. This required Claimant to lift between 35-150 pounds. The job also required Claimant to carry his tools in a bucket from place to place, and this bucket could weight between 40-70 pounds. Claimant testified that a shipfitter would also have to do a lot of climbing, bending, stooping, and working in confined spaces.

[3] Claimant stated that his brother-in-law stays home also and does not work; he is on social security.

On July 16, 2001 Claimant started work between 6:30 a.m. and 7:00 a.m. Claimant recalled that on this day he and his helper were either working on a section for the deck or on a main frame bulkhead. Claimant and his helper were taking turns lifting and throwing angles. When it was Claimant's turn, he lifted the angle and went to throw it, but the end of it caught on the other end of the bundle and the angle came back toward Claimant. He put his hands up to block it and his body twisted. Claimant stated that at that point he did not feel any pain, but he did feel a click. It was after he resumed working that Claimant's back began to hurt. Claimant took some pain medication and continued working the rest of the day. Claimant testified that he mentioned to his helper that his back was hurting[4].

Claimant notified Employer the next day that his back was hurting him and that he was not coming to work because he could hardly move and he needed to rest. Around July 18, 2001 Claimant returned to work but said he was unable to even lift his bucket of tools. He told Employer that he needed to see a doctor for his back. Employer, however, did not send him to the doctor until about four days after this request.

Clyde Sneed set up an appointment for Claimant to see Dr. Satir and Employer made arrangements to pay the doctor cash. Claimant was treated by Dr. Satir for about three years. Claimant testified that he did not have any problems with Dr. Satir and that Claimant thought he was a good doctor. Dr. Satir prescribed pain medication for Claimant to ease his pain and help him be more mobile. Dr. Satir prescribed Vicodin 10 (five doses a day), Soma 350 (five doses a day) and Mobic anti-inflammatory (twice a day) for Claimant. After about three years of treatment, Dr. Satir put Claimant on a progression plan to reduce his intake from five pills a day to two pills a day. Claimant testified that Dr. Satir recommended this progression because he was dropping Claimant as a patient. Claimant stated that he was getting dropped because Dr. Satir was tired of dealing with AIG insurance company; there were more tests that Dr. Satir wanted done and the insurance kept refusing and Dr. Satir could not deal with it anymore.

Dr. Satir sent Claimant to TIRR Medical Group for physical therapy. Claimant testified that this therapy eased his pain for a bit, but that the pain would come back. Claimant stated that the pain medication was most helpful and when Dr. Satir reduced his medication, he could barely get around. Claimant testified

[4] Claimant did not remember the name of his helper on the day of the accident. Claimant testified that this particular helper was new and they had only worked together for a few days.

that it was his understanding that his back could not be fixed surgically and that it would only get progressively worse.

Claimant was referred to a back specialist in Houston, Dr. Bindle, who, according to Claimant, told Claimant that his whole lower back was "shot" and that surgery was not an option. Dr. Bindle told Claimant that he would have to learn to manage his pain.

After Dr. Satir withdrew as Claimant's physician, Claimant was referred by a friend to Dr. Emejulu, who is currently Claimant's treating physician. Dr. Emejulu's treatment of Claimant has been restricted by the insurance company, who says that Claimant can only get a limited number of pain pills or they will not pay for the prescriptions or for the doctor fees. Now Claimant is being prescribed two Narco 10's and two Somas per day. Claimant stated that Dr. Emejulu told him to take aspirin or advil in between his other pain medication if he needed it. Claimant testified that as of the day of his hearing, his low back hurt and that pain would shoot down his left hip; this pain has been with Claimant since the day of the accident. Claimant stated that his pain is about an eight out of 10 with the medication that he is currently taking. When Claimant was taking the medication more often, he testified that his pain was about a four; he still felt it, but he could live with it. Claimant explained that based on the way he felt that moment he did not feel that he could go back to work as a shipfitter.

Claimant stated that he can no longer do hobbies such as woodworking, scuba diving, water skiing, or bike riding. He said he really does not do any chores at home, except for washing the dishes after mealtime. His day consists of sitting around, watching TV, or lying down for a bit. Claimant testified that he only sleeps for about two hours a night, that he can not ride in a car or walk for an extended period of time and that he has trouble bending or stooping.

Claimant testified that he has had a chronic liver condition, hepatitis B, for about 25 years. In the 1980s Claimant hurt his left knee and had to have surgery on it. He hurt his right knee while working for TDI[5]. He had surgery on a Friday and was back at work on Monday on light duty. Claimant also noted that sometime between 1995 and 1996, while he was working at Betz, he strained his back muscle. Claimant explained that he took a few days off work and then returned to light duty. Claimant was asked why he did not mention this back

[5] Claimant noted on cross-examination that his knees bother him in cold weather and he has trouble squatting.

injury when Employer's counsel asked him if he had any previous back injuries at his deposition. Claimant responded that he did not think of it at the time, that the injury did not really hurt him that bad.

During Claimant's time working for various shipbuilding outfits he had to have physicals and he never had a problem passing any of these tests. Claimant explained that he did not have a back problem when he went to work for Employer.

Claimant's counsel referred Claimant to the insurance company's Labor Market Survey that was conducted in September 2005. Claimant stated that he contacted some of the employers on the list, but that he either could not get through on the phone, or the requirements of the job were too strenuous for the 20 pound limitation on what he can lift. Claimant also stated that he cannot work in food service due to his hepatitis. Claimant was questioned regarding his probation. One of the terms and conditions of his probation is that he be engaged in employment, if he is able. Claimant is also required to do community service. Claimant worked with the charity organization, Bread of Hope, where he emptied small wastepaper baskets and wiped off tables for about an hour and 15 minutes a day.

On cross-examination Claimant was questioned regarding a Functional Capacity Evaluation (FCE) that he completed in 2004. Claimant agreed that during this test he was able to lift about 20 pounds. At first Claimant did not recall Dr. Satir releasing him to light duty work based on the FCE, but then Claimant remembered that Dr. Satir told him he could go back to light duty work for Employer. Claimant stated, however, that Employer did not have light duty work and that Employer told Claimant he could not come back to work until he was fully released. Claimant did not attempt to find light duty work anywhere else, nor did he fill out any job applications since his injury in 2001.

Claimant was shown a work release dated September 24, 2004 signed by Dr. Satir. However, Claimant testified that he had never seen the release before. When Claimant went to see Dr. Emejulu he requested that the doctor prescribe him five Vicodin and Five Soma per day. Claimant stated that other than physical therapy that he did in 2002, he has not had any other treatment for his back other than pain medication.

Claimant testified that after he stopped working at Betz, he applied for several chemical operator jobs, but that each of them required a minimum of two

years of college. Claimant noted that if a job was found for him within his restrictions, that he would be willing to work. Claimant conceded that there were several weeks, during his time with Employer, when he did not work a full five days.

Claimant was next questioned regarding an incident with his ex-wife that occurred after Claimant's July 16, 2001 injury. Claimant pled guilty to assault for pushing his wife at a dinner party. In 2001 Claimant also pled guilty to felony indecency with a minor and is now a registered sex offender; he is restricted from working with minors under seventeen years of age. Due to this offense, Claimant spent 45 days in jail where he was not allowed his narcotic medication. Claimant stated that he would take as many aspirin as he could buy during this time period.

On re-direct Claimant testified that he used to own a vehicle prior to the accident, but that it got repossessed. Claimant stated that he depends on his brother-in-law or friends to take him where he needs to go. Claimant stated that he did not know of anyone that would be willing to take him back and forth to a job in Beaumont, Texas five days a week.

Susan Rapant

Susan Rapant, a certified Rehabilitation Counselor testified at the hearing. Ms. Rapant was asked by Employer to conduct a vocation assessment of Claimant, which included Ms. Rapant meeting with Claimant, reviewing his medical records and doing a Labor Market Survey. Ms. Rapant used several factors in determining what jobs were available for Claimant. She used information obtained from her meeting with Claimant and from an FCE that was in the file, dated September 2004. The FCE summarized Claimant's ability to work as in the medium work range. Ms. Rapant then looked to see if a doctor had substantiated the FCE. Medium work includes the ability to lift or carry 25 to 50 pounds occasionally and 10 to 20 pounds frequently.

Ms. Rapant testified that Dr. Satir had signed off on this medium work release and had referenced the FCE. During the FCE, Claimant pushed and pulled 40 to 50 pounds and lifted about 25 pounds. Ms. Rapant stated that Mr. Self met the standard to qualify for light duty work, which includes the ability to lift 20 pounds occasionally and 10 pounds frequently. Based on the FCE, Ms. Rapant

considered Claimant to be somewhere between light and medium duty capabilities, and thus considered both light and medium work in her Labor Market Survey[6].

Ms. Rapant explained that the first job on her initial Labor Market Survey (EX 10) was at the Texaco Food Mart[7]. She was told that Texaco needed a cashier to work in the convenience store and that the employee, in addition to dealing with the money, would be responsible for sweeping and keeping the store orderly. Ms. Rapant had re-contacted Texaco within the past week and they were still in desperate need of an employee. Ms. Rapant noted that the job is listed in the Dictionary of Occupational Titles as light, and that based on her communications with Texaco, it was adhering to that definition. The job paid $5.15 an hour.

Ms. Rapant next discussed the second job she had found at Out Source Staffing. This Staffing agency had office janitorial work available that would be light work and paid minimum wage with potential future increases. The agency told Ms. Rapant that it would work with anyone's lifting restrictions. This job would entail vacuuming, emptying small garbage cans, wiping off desks, and dusting. This job paid a minimum of $5.15 an hour. Ms. Rapant testified that she had re-contacted this agency within the past week and the job was still available.

Ms. Rapant found another janitorial position available at Brown's Cleaning Service. This job included similar cleaning duties, but was classified as light to medium work. Brown's Cleaning told Ms. Rapant that it had a good relationship with the Texas Rehabilitation Commission and was used to working with individuals with limitations or disabilities. This job paid $6.50 an hour.

The fourth job Ms. Rapant identified was a dry cleaner position at Alamo Cleaners. This job is classified under the Dictionary of Occupational Titles as medium work. However, when Ms. Rapant spoke with the potential employer, she was told that accommodations could be made to meet an individual's lifting

---

[6] Her initial survey was conducted from September 1-30, 2005, and included a selection of employers within a 35 mile commuting radius of Claimant's residence in Orange, Texas. From January 18-19, 2006, Ms. Rapant conducted additional labor market research which she included as an addendum to her initial report. She conducted this follow-up research because Hurricane Rita could have potentially affected her initial results and because she learned new medical information that seemed to place Claimant more firmly in the light duty work classification. (EX 10, 26). This addendum focused on light duty work available to Claimant.

[7] On cross-examination Ms. Rapant stated that she did not know if this position would require Claimant to refill the ice machine. No one at the store had included this as one of the cashier's duties.

limitations. The job paid $5.15 an hour and was still available at the time of the hearing.

Ms. Rapant went on to list a number of other jobs that included two more light duty cashier positions, one at Petro Travel Store which was available as of the week of the hearing and paid $6.50 an hour, and one at Wal-Mart that paid $5.75 an hour. Ms. Rapant also listed a job opening at Home Depot for someone to assist customers and do money transactions (no loading or unloading was required). Toys-R-Us had a job available for a seasonal bike assembler, but after discussing the position with the manager, Ms. Rapant determined that the position was out of Claimant's restrictions. Lastly, Ms. Rapant noted a job opening with Sears for a sales associate in the sporting goods department that paid $6.50 an hour and involved working as a cashier and potentially mixing paint[8], but she was unable to follow-up with Sears regarding the continued availability of the position.

Ms. Rapant was referred to EX 26, a second Labor Market Survey conducted on January 18-19, 2006, as an addendum to Ms. Rapant's first Survey. Ms. Rapant explained that the reason she conducted a follow up survey was because hurricane Rita had affected the area and she wanted to ensure that the jobs she had listed in her first report were still available. Also, Ms. Rapant stated that she had read an updated medical report stating that Dr. Emejulu and Dr. Haig classified Claimant as lifting only 20 pounds and that she wanted to find out more information about some of the jobs she had listed to make sure they fell within this new requirement, or to find new jobs if necessary.

Ms. Rapant clarified that the cashier job at Wal-Mart was still available and that no lifting over 20 pounds was required. Ms. Rapant also listed additional jobs at Blockbuster Video for a cashier[9] that paid $5.25 an hour, at Holiday Inn for a night auditor, front desk clerk, reservation agent, and greeter-cashier, all of which are light in nature, with a minimum pay of $5.85 an hour, and at Tinseltown for a ticket taker or cashier at $5.15 an hour.[10] Ms. Rapant was informed that each of these positions was considered light duty, but that the Blockbuster position had been filled.

---

[8] On cross-examination, Ms. Rapant acknowledged that five gallon puckets of paint were sold at Sears and that they would weigh more than 20 pounds.

[9] Ms. Rapant clarified on cross that a Blockbuster employee may have to restock the movies, but that they could work at their own pace and did not have to carry heavy boxes full of movies; the main function of the job was as cashier.

[10] Ms. Rapant also noted on cross that as a greeter at Holiday Inn, Claimant could probably sit sometimes, and that both the ticket taker and ticket seller positions at Tinseltown could be done sitting down.

Ms. Rapant testified that the Texas Workforce Commission offered services to aid individuals in applying for jobs. This Commission has phones and computers available and it has people onsite to help individuals prepare resumes and provide general employment guidance. Ms. Rapant noted that some of the jobs listed in her Labor Market Survery did require online applications. For example, at Home Depot individuals can go into the store and apply online. There are people at the store to help guide applicants through the process.

Ms. Rapant testified that she believed Claimant met at full range the job requirements for light duty classification. She also stated that the jobs classified as medium had specified that they would work within an individual's restrictions and try to accommodate them. Ms. Rapant noted that the jobs listed in the survey were available in the Beaumont, TX area and that she believed Claimant was capable of realistically securing one of these jobs if he tried diligently.

Ms. Rapant stated that she felt Dr. Haig and Dr. Emejulu had put Claimant on light duty classification. She noted that Claimant himself had told her in their interview that he felt he was capable of doing light work; however, she did not feel that he was particularly motivated to return to work.

Ms. Rapant rebutted Claimant's testimony that he needed two years of college to work as a chemical operator. She stated that there is a certification program that she is aware of, but she did not think that a degree was required for these jobs; she did note that sometimes the job would express a preference for experience.

On cross-examination, Ms. Rapant testified that she did not know what the various jobs listed in her survey would have paid as of July 16, 2001; however, she did explain that minimum wage was the same in 2001 as it is now and since most of these jobs are in the minimum wage range, they probably were in that same range in 2001.

Ms. Rapant acknowledged that the employment rate for disabled persons is very low in the United States, and that the longer someone is unemployed due to a disability, the lower his/her chances become of going back to work. According to CX 16, a newspaper article from the *Beaumont Enterprise*, the unemployment rate in the Golden Triangle is currently the highest in Texas.

Ms. Rapant was asked if Hepatitis-B precluded Claimant from working in the food industry. She testified that according to her research with the Health Department, restaurants are not supposed to discriminate against people with Hepatitis or HIV because that is not how the diseases are transmitted.

Ms. Rapant did not know if the jobs she listed on her Labor Market Survey were available between September 2005 and January 2006 (when she rechecked the status of the jobs) or if hurricane Rita had foreclosed any of these positions during that time period.

Ms. Rapant acknowledged that all of the jobs she had found were located in Beaumont, TX, which is 30 minutes from where Claimant lives; she did not find any jobs in Orange, TX. However, Ms. Rapant testified that she did not think Claimant's lack of transportation made these jobs unrealistic. She stated that carpooling or some other means of transportation might be available, but she also admitted that she did not know of anyone that lived in Orange and worked at any of the particular locations listed in her survey that might be willing to carpool with Claimant.

William J. Kramberg

William J. Kramberg, a vocational rehabilitation counselor, testified by deposition on February 20, 2006. He is a certified rehabilitation counselor as well as a licensed professional counselor in Texas. Mr. Kramberg was hired by Claimant to review the work product of the employer/carrier rehabilitation counselor in an effort to understand the appropriateness of the vocational alternatives that she posed for Claimant. In preparing his report, Mr Kramberg reviewed records and depositions from Dr. Emejulu, Dr. Haig and other additional medical records and reports. He explained that in cases such as this where he is not providing direct services to the individual, he does not necessarily give more weight to one doctor over the other. If he were providing direct services, then he would have an obligation to keep the individual out of harms way, and that might mean questioning a medical opinion that, based on his experience, he thought was harmful.

Through various testing and communications with Claimant, Mr. Kramberg determined that Claimant has good reading comprehension skills, but is somewhat deficient in math, being at about a sixth grade level. Claimant's overall reasoning ability is in the low average range.

Mr. Kramberg stated that as a vocational counselor, he considered wages versus mileage to be an important factor in assessing job placement. He stated that someone working a 40 hour week and commuting 30 miles each way, based on the reimbursable rate from the government, would spend about 64 percent of their gross income on travel expenses. (Mr. Kramberg stated that he thought the reimbursement rate for mileage was 44.5 cents a mile.) Given Claimant's lack of transportation, Mr. Kramberg noted that it would have been more appropriate for someone to look in Claimant's home town of Orange to find employment for him.

Mr. Kramberg testified that he did not think Claimant could return to his pre-injury employment. Mr. Kramberg stated that he understood Dr. Emejulu's restrictions for Claimant to include Claimant not lifting more than one pound, that he alternate sitting, standing and walking, and that he should not push or pull. Dr. Emejulu also noted that Claimant might have "bad days" where he was unable to go to work and that this might occur as often as one day per week. Regarding Dr. Haig's restrictions for Claimant, Mr. Kramberg summarized his understanding of them as follows: that Claimant could not go back to work involving heavy lifting/shipbuilding, that Claimant could safely lift up to 20 pounds at a time, Claimant could restock shelves up to 20 pounds at a time, he could lift up to 24 pounds once a day, he could sit and stand for unlimited periods, bending for long periods could cause flare ups, and that Claimant should not bend or stoop.

Mr. Kramberg stated that according to the *Dictionary of Occupations Titles*, a classification of "light duty" means lifting 20 pound occasionally and 10 pounds frequently, and the ability to walk and stand for a significant period of the day, which is defined at six hours. In terms of Dr. Emejulu's restriction that Claimant not lift more than one pound, Mr. Kramberg found that this type of severe restriction would prevent Claimant from working altogether. Mr. Kramberg also found Dr. Emejulu's statement that Claimant may have to miss one day of work per week to be extremely limiting, in that it would be hard for Claimant to find an employer willing to accommodate this. Based on Dr. Haig's limitations for Claimant, Mr. Kramberg found that Claimant fit within the "light" category as far as lifting, but that the restriction placed on bending and stooping would allow Claimant less than a full range of light duty.

Mr. Kramberg stated that as part of his assessment, he reviewed Ms. Rapant's labor market survey of September 2004 and called all of the listed employers to determine whether he thought these jobs were appropriate for Claimant. Mr. Kramberg first noted that some of the positions listed were for medium duty work; he did not think that any of these positions would be

appropriate for Claimant. Based on the FCE of Claimant and the medical reports from the various doctors, Mr. Kramberg did not think Claimant fell within the medium duty classification. Mr. Kramberg explained that Claimant did not really complete all of the requirements for medium duty during his FCE.

Mr. Kramberg next addressed the individual job positions set out in the labor market survey. He stated that Ms. Rapant spoke to Janice at the Texaco Food Mart, as part of her labor market survey; however, Janice did not have hiring authority. Janice was a cashier at the store. Janice told Mr. Kramberg that the position was still open, there was no preemployment testing, sixth grade math skills would not be a problem, and she was not sure of an exact amount of lifting but probably not much and it would be occasional. Stocking would involve bending and stooping on occasion. Janice also stated that when the soda dispenser needed to be refilled, the boxes could weigh up to 65 pounds, but she would ask a customer to lift the box and then would give them a free drink. A stool was available to sit, but he owner did not like to see people sitting and doing nothing. The job also involved cleaning the store, which included mopping, sweeping, emptying trash and taking it to the dumpster. Janice also said that a day off per week could be accommodated if there was advance notice.

Mr. Kramberg explained that he thought this job was inappropriate because it would require bending and stooping, which Dr. Haig had advised against. He also did not think it was appropriate to have a customer do the heavy lifting, and thought management would not allow this.

Mr. Kramberg stated that per Ms. Rapant's report, the jobs at out source staffing are medium duty jobs. They are temporary to begin with, but could become permanent. The jobs included light industrial workers, electronic assembly and janitorial jobs. According Mr. Kramberg's research, the lifting requirement is usually over 20 pounds. Mr. Kramberg noted that out source staffing does have clerical and office jobs that are light, but given Mr. Self's experience, Mr. Kramberg did not think these jobs would be appropriate. Employer's with out source staffing also generally did background checks and drug testing, but the use of narcotic medication would be determined by the individual employer. The individual employer would also decide on a case-by-case basis whether or not the employee could miss a day of work per week.

Mr. Kramberg did not think that the position at Brown's Cleaning Services was appropriate for Claimant because the job could require lifting bags of trash that could be more than 25 pounds, and there would definitely be bending and

stooping involved. Mr. Kramberg called Alamo Cleaners, but was not able to get through. He did note however, that the job was listed as a medium duty job.

Regarding Wal-Mart, Mr. Kramberg's office spoke to a person in human resources about the cashier position. There were no current openings for a cashier. They do no do preemployment testing, but they do some testing after hiring to help employees use the computer and register. There is no problem with sixth grade math skills, and the job usually requires standing all day, a stool would be considered a special needs accommodation and would be determined on a case-by-case basis. The job might require lifting up to 20 pounds, as well as bending, stooping, leaning, pushing and pulling. However, the job of working at the self-service counter may have different physical requirements, and this would again be determined on an individual basis. Employees were not allowed to take narcotic pain medication while on the clock and missing one day of work per week would eventually lead to them getting fired.

Ms. Rapant also listed a Wal-Mart position of courtesy attendant/cart pusher, but the job required lifting up to 40 pounds. There is a machine, called a mule, that is used to push up to 25 carts at a time, but if the mule breaks, then the employee must use a rope to tie at least 10 carts together at a time. Mr. Kramberg stated that he did not think any of the positions at Wal-Mart were suitable for Claimant.

Mr. Kramberg next discussed the positions identified in the labor market survey at Home Depot. He was told by a person in human resources that Home Depot had frequent openings due to turnover since the hurricane, both part time and full time, that it does do preemployment testing and that it would be questionable whether a person with sixth grade math skills could perform the job. Also, Mr. Kramberg was told a restriction of being able to lift only 20 pounds would be a problem because many things in the store are heavier than that. The job did include bending and stooping in order for employees to scan items and move them. Poor attendance would not be acceptable. Mr. Kramber did not find these positions to fit within Claimant's limitations.

Mr. Kramberg also contacted Toys R Us regarding the bike assembler position. He was told that this position would be seasonal and they would not expect to begin hiring again until October 2006.

Mr. Kramberg was unable to contact anyone at Sears regarding the sales associate position. However, he testified that in his experience these types of sales

jobs require good "people skills" and might be more of a medium duty job. He questioned whether this job would be appropriate for Claimant.

Mr. Kramberg spoke with Norma at the Pine Tree Restaurant and again determined that this job would not be suitable for Claimant. The labor market survey defined this job as medium, and it required bending, stooping and lifting of 20-25 pounds. Norma told Mr. Kramberg that they did not have time to train anyone, and could not work with an individual with physical restrictions.

Mr. Kramberg next reviewed Ms. Rapant's January 2006 addendum to the labor market survey. With regard to the blockbuster job listing, Mr. Kramberg stated that the manager said there was no job opening currently available and there would not likely be an opening for a couple of months. There was no preemployment testing, sixth grade math skills were sufficient, there was not a lot of lifting required, maybe five to ten pounds of videotapes, but bending and stooping were required in order for employees to restock the shelves. The manager said that the store could probably work with someone who missed one day of work per week, especially if advance notice was given.

Mr. Kramberg stated that the Holiday Inn Beaumont Plaza positions of night auditor, desk clerk and reservation agent had all been filled. The only opening was for a greeter/cashier in the restaurant, and this was a guest services type position, such that someone without customer service experience would not qualify.

The night auditor position would require good math skills and bookkeeping and probably an accounting background. Sixth grade math skills would not be sufficient for the cashier/greeter either. The desk clerk and reservations clerk positions do require computer or keyboarding skills. The desk clerk, greeter, and cashier require constant standing, and stools and chairs are not provided. There is no preemployment testing.

Regarding the positions listed at Tinseltown, Mr. Kramberg testified that there were not openings for cashier/ticket seller[11], there was an opening for a clerk/cashier in the concession stand, but that they prefer prior cash handling experience. There was also an opening for usher/ticket taker, which involves standing and walking and cleaning and helping to stock the concession stand. Mr. Kramberg stated that the lifting requirement was up to 30 pounds and frequent

[11] Mr. Kramberg did acknowledge that the job of cashier/ticket seller would probably be a mostly sedentary job.

bending and stooping to pick up trash would be involved. There was no preemployment testing for either position and Tinseltown would determine on a case-by-case basis whether missing a day of work per week would be acceptable.

Mr. Kramberg testified that the Petro Travel Store had just filled a custodian position and had no current openings. The contact person at this store told Mr. Kramberg that there was no preemployment testing, sixth grade math skills would be sufficient if the applicant thought he/she was capable of handling the money, the store would try to accommodate lifting restrictions, filling the soda fountain required lifting a five gallon box but they would be willing to get assistance for this, and bending and stooping were required in order to stock shelves. Mr. Kramberg was also told that the store could not accommodate an individual missing a day of work per week.

Mr. Kramberg stated that based solely on the restrictive physical limitations noted by Dr. Haig, the only job that would be appropriate for Claimant would be the cashier/ticket seller position at Tinseltown. However, other factors, namely, Claimant's insufficient math skills, would cause Mr. Kramberg to rule this job out also. Based on Dr. Emejulu's physical restrictions for Claimant, Mr. Kramberg did not think any of these jobs were suitable for Claimant.

Mr. Kramberg also thought that Claimant's Hepatitis B would hinder his ability to work around food. He also explained that with regard to the disabled population, the longer a person is out of the labor force, the less likelihood there is of them returning. When asked if medication would be a problem for Claimant, Mr. Kramberg stated that if Claimant were to take the amount of medication prescribed by Dr. Emejulu, this would further narrow the types of jobs that Claimant would qualify for. For example, Claimant would not be able to be around moving machinery, heavy equipment, or driving occupations. Also, employers, such as some discussed previously, may have policies in effect that would not allow Claimant to take certain medications while he was working.

Mr. Kramberg acknowledged that most of the work he does with vocation assessment involves litigation, and of his longshore vocation assessment cases, he almost always works on the Claimant's behalf.

On cross-examination, Mr. Kramberg clarified that he did not think that Claimant's Hepatitis B in and of itself would preclude Claimant from getting employment; however, he did think that the hepatitis coupled with Claimant's other restrictions would hinder his ability to find a job. Mr. Kramberg also

acknowledged that he was aware that both Dr. Emejulu and Dr. Haig had stated that they thought Claimant could work as a cashier[12]. However, Mr. Kramberg stated that the problem with physicians stating their opinion regarding a generic job title is that the physicians often do not have the details of what each job requires.

On redirect Mr. Kramberg testified that there is a difference between someone lifting certain weights occasionally, for example Claimant lifting groceries, and someone having to lift things daily at work because at work an individual does not have the choice whether to perform those activities or not. He also explained that FCEs are generally done in one day over a couple hours time and that it thus does not factor in the day-in and day-out work environment. Mr. Kramberg testified that after considering the limitations placed on Claimant by Dr. Emejulu and Dr. Haig, he did not consider any of the jobs presented on the labor market survey to be appropriate for Claimant.

Medical Evidence

Medical Records from Servet Satir, O.D. (CX 10)

Dr. Satir provided medical records regarding his treatment of Claimant. Dr. Satir first saw Claimant on July 25, 2001; Claimant presented with low back pain, tingling and numbness in his legs and weakness in his knees. Claimant told Dr. Satir that he was injured at work and Employer had sent him to Dr. Satir's office. Dr. Satir noted tenderness in Claimant's SI joints and spasms into the lower lumbar segments. X-rays were taken, which Dr. Satir noted as unremarkable. Dr. Satir placed Claimant on Robaxin, Indocin, and Darvocet and told him to come back for a follow-up in about a week. In the meantime, Dr. Satir placed Claimant on light duty.

Claimant returned to Dr. Satir on July 30, 2001 with the same complaints of back pain. Dr. Satir scheduled a follow-up visit for August 13, 2001 and allowed Claimant to return to work with light duty restrictions in place until August 13, 2001. On August 29, 2001, Dr. Satir referred Claimant to physical therapy. Claimant was thus evaluated as part of his physical therapy treatment and back spasms and sever loss of ROM were noted. It was recommended that Claimant undergo physical therapy three times a week for four weeks. Dr. Satir also requested an MRI for Claimant which was done at St. Mary's Hospital on

[12] On redirect Mr. Kramberg clarified that it was his understanding that both Dr. Emejulu and Dr. Haig said that Claimant could work as a cashier if it was within the physical limitations that they had set out for Claimant.

September 30, 2001. The results showed moderate disk degeneration and mild posterior central disk bulge at the L4 to 5 level.

On September 25, 2001 Claimant returned to Dr. Satir to request a refill on his vicodine. Over the next couple of months Claimant continued to see Dr. Satir and complain of low back pain, which Claimant stated was only relieved by medication. It appears that Dr. Satir referred Claimant to Dr. Dumitri to investigate the possibility of injections. On January 11, 2002 Claimant saw Dr. Dumitri; Dr. Dumitri noted in his records that Claimant should return for injections pending worker's compensation approval.

Claimant returned to Dr. Satir on February 8, 2002. Dr. Satir noted that the orthopedic had recommended that Claimant stop physical therapy and start injections. Sometime before May 25, 2002 Claimant was approved for his first epidural injection with Dr. Dumitri. Claimant continued to see Dr. Satir monthly without much change in Claimant's condition. Dr. Satir continued Claimant's off work status and refilled his medications. On May 25, 2002 Claimant saw Dr. Satir and Dr. Satir made a notation that Claimant was taking his pain medications five times a day. On June 27, 2002 Dr. Satir noticed that Claimant could not lift his left foot or wiggle his toes. Based on this evaluation, Dr. Satir recommended that Claimant see a neurosurgeon[13]. On July 25, 2002 Dr. Satir again notes that Claimant is taking his medication five times a day and that Claimant ran out of his prescription early. Claimant tells Dr. Satir that he has been taking his daughter's xanax to sleep. Dr. Satir continues Claimant's off work status.

On July 30, 2002 an MRI of Claimant's back was performed. The report conclusion stated that there was transitional vertebra at lumbosacral junction labeled L6, mild degenerative disc disease of L5-L6 disc with mild posterior annular bulge, and no evidence of focal disc protrusion, extrusion or stenosis. (CX 10, pg. 43) After the MRI, Claimant continued to see Dr. Satir monthly; Dr. Satir would refill Claimant's prescriptions and make a note of any important observations. On October 28, 2002 Dr. Satir noted that Claimant was still having numbness in his left foot, but that Claimant was now able to freely move the foot. On February 27, 2003 Dr. Satir again examined Claimant and noted no change in Claimant's status. In Dr. Satir's notes, he stated that an orthopedic doctor recommended surgery for Claimant's back; the Orthopedic did not think

[13] Per Dr. Satir's referral, Claimant saw Dr. Proffitt, a neurologist, on May 12, 2003. Dr. Proffitt conducted and EMG. Dr. Proffitt concluded that Claimant's EMG was abnormal, demonstrating a lumbosacral radiculopathy, predominantly L5-S1 nerve root involvement, left leg, chronic process. (CX 10, pg. 10, EX 19)

Claimant's condition would improve without surgery. Dr. Satir agreed with this recommendation since Claimant had not improved in over a year of treatment. It appears that Claimant continued to see Dr. Satir until September 2004. On September 24, 2004 Dr. Satir released Claimant to return to work and noted that Claimant should adhere to the restrictions listed on the FCE. (EX 20, pg 2)

September 29, 2001 MRI (EX 22)

As recommended by Dr. Satir, an MRI of Claimant's lumbar spine was conducted on September 29, 2001. The "impression" of the reviewing doctor was that the MRI showed moderate disk degeneration and mild posterior central disk bulge at the L4-5 level.

Dr. Curtis Thorpe (EX 22, CX 11)

Dr. Satir referred Claimant to Dr. Thorpe at the Beaumont Bone and Joint Institute. According to Dr. Thorpe's report, dated October 31, 2001, Claimant told Dr. Thorpe that his back had improved, especially since taking the naprosyn. Dr. Thopre noted that the MRI from September 29, 2001 showed a minor amount of bulging at L4-L5, but there was no evidence of nerve root impingement. Dr. Thorpe diagnosed Claimant with a lumbar strain and some degree of discogenic back disease. Dr. Thorpe recommended that since Claimant had not improved after three months of physical therapy, that he should try epidural steroid injections and referred Claimant to Dr. Dumitru.

Dr. Ajay K. Bindal (EX 9, CX 12)

Dr. Satir referred Claimant to Dr. Bindal for examination. Dr. Bindal saw Claimant on May 22, 2003 for an initial evaluation. Dr. Bindal noted weakness in Claimant's EHL muscle group and otherwise intact reflexes. Dr. Bindal reviewed the July 2002 MRI and noted that it revealed an L5-6 herniated disc. However, Dr. Bindal advised Claimant to obtain an updated MRI as this one was old. Dr. Bindal wanted to see Claimant again after the new MRI was complete in order to determine the next course of action. On September 12, 2003 Claimant returned to Dr. Bindal's office with an updated MRI. Dr. Bindal noted that Claimant's condition and his examination remained unchanged from his last visit. Dr. Bindal found that the new MRI showed improvement from the previous scan with no real significant disc herniation present. The L4-5 level showed some changes in the disc consistent with degeneration. Dr. Bindal advised Claimant to continue with nonoperative treatment; he did not recommend surgery based on the improved appearance of the MRI.

Dr. Martin Haig (EX 8)

Dr. Haig, an orthopedic surgeon since 1956, testified by deposition on January 12, 2006. Dr. Haig stated that over a three year period, he testified 55 percent of the time for the defendant and 45 percent of the time for the Plaintiff. As requested by Employer's insurance carrier, Dr. Haig examined Claimant on two occasions, first on August 7, 2002 and next on November 12, 2003.

Dr. Haig took a medical history from Claimant in which Claimant stated that he hurt his back while at work throwing angle iron. Claimant told Dr. Haig that that night he went home and took some home remedies; the next day he was very sore and did not go to work. Claimant was not any better two days later and started seeking medical treatment. Claimant told Dr. Haig that his low back was improving somewhat, when about two weeks prior to his visit to Dr. Haig, Claimant tripped down some steps and injured his low back. After his injury, a second MRI was done. Dr. Haig noted that Claimant was taking a large amount of vicodin and soma.

Dr. Haig testified that he also physically examined Claimant and noted Claimant's straight leg raising was very painful and that he had a left foot drop, paralysis or inability to raise his left foot. Dr. Haig stated that this was probably a sign of a pinched nerve at L4 and L5. Dr. Haig reviewed Claimant's MRI of July 25, 2001 and noted some bulging at L4 and L5, but no ruptured disc. Dr. Haig stated that this was puzzling to him because, due to the foot drop, he would have suspected a ruptured disc. Thus, Dr. Haig recommended an EMG to test for nerve root pressure. An EMG was conducted and showed some nerve root irritation in the L5 and S1 space. Dr. Haig thought that the EMG was compatible with Claimant's condition even though it was not the exact space that Dr. Haig had diagnosed. Dr. Haig noted that Claimant has six lumbar vertebrae, which is a rare condition, and as a result, Claimant's disk space may be aligned one space high or one space low.

Dr. Haig diagnosed Claimant with paralysis of the foot due to a rather serious nerve injury that Dr. Haig could not prove. Dr. Haig stated that he was also concerned that Claimant was taking too much narcotic medication.

Dr. Haig examined Claimant again on November 12, 2003. Dr. Haig found that Claimant's straight leg raising had improved and was close to normal, and there was no paralysis of the foot. However, Claimant's left great toe extensor muscle was slightly weaker on the left than on the right which indicated some residual L4 and L5 nerve root irritation. After this examination Dr. Haig was of

the opinion that Claimant had probably suffered from a slipped disc or pinched nerve and had now recovered, except for some small residual injury at L4 and L5. Dr. Haig was again concerned that Claimant was taking too much pain medication[14]. Dr. Haig stated that he did not think it was reasonable or necessary for Claimant to be taking that much medication at that point in time. Dr. Haig stated that Claimant was not in severe distress when he was in the office, but that the amount of medication he was taking was an amount that Dr. Haig would consider necessary only for someone in severe distress.

Dr. Haig noted that if Claimant were his patient, he would have put him on a pain control program and would have initially tried to get Claimant to reduce his narcotic intake on his own. Dr. Haig explained that in his practice, patients are not usually able to reduce their narcotic intake voluntarily, and if that happens, he sends the patient to Dr. Joe Allen, a psychiatrist, who has been successful in getting these people off of heavy narcotics.

Based on this second clinical examination, Dr. Haig found Claimant significantly improved and would have placed Claimant at maximum medical improvement (MMI) as of November 12, 2003. Beyond pain management, Dr. Haig stated that he did not think Claimant needed any further treatment.

After this examination, Dr. Haig believed Claimant could return to work, but would not recommend heavy work in shipbuilding. Dr. Haig testified that in his opinion, no one with a serious back injury should ever lift 50 pounds, and he/she should always be careful of "bending, squatting or crouching in long positions --- in awkward positions." (EX 8, pg. 16) Dr. Haig also felt that a job with a 20 pound weight restriction would be best for Claimant. Dr. Haig felt that Claimant could walk and sit without restrictions.

Dr. Haig reviewed the labor market survey presented by Ms. Rapant and opined that Claimant could work as a cashier at Texaco Food Mart, as long as the lifting restrictions were 20 pounds. Dr. Haig stated that Claimant would be capable of stocking shelves up to 20 pounds at a time. Dr. Haig also testified that he thought Claimant could do janitorial work and work in a laundry. Dr. Haig found no problem with Claimant working as a cashier/custodian at Petro Travel Store nor with the cashier position listed at Home Depot. Dr. Haig stated that the bike assembler position at Toys R Us was suitable for Claimant because the individual bike parts would most likely not be that heavy and once the bike was

[14] Claimant was taking five pain pills per day, plus soma.

assembled, Claimant could roll it. With regard to the sales position at Sears, Dr. Haig noted that five gallon buckets of paint might be too heavy for Claimant, but other than that Dr. Haig thought Claimant could perform the job functions. Dr. Haig also thought Claimant could work as a dishwasher/kitchen help at the Pine Street Restaurant.

Dr. Haig testified that he believed even Claimant's reduced amount of medication (two vicodin and two soma per day) was not reasonable or necessary for Claimant and that Claimant would become addicted. Dr. Haig stated that he thought Claimant's back had healed as much as it was going to, and that he would recommend Claimant accept his condition and try to find a job to improve his self-esteem. He was strongly against Claimant having additional physical therapy as he thought this would only reinforce Claimant's symptoms and not help him. Dr. Haig did not think surgery was an option. Dr. Haig reviewed the description of light duty and stated that he thought Claimant was a good candidate for light duty work.

Upon cross-examination by Mr. Mc Elroy, Dr. Haig acknowledged that in his experience orthopedic surgeons tend to discourage the use of pain management for long term care of a patient. In his opinion, the best way to treat pain is to find the cause of the pain and remove it, if possible. Dr. Haig admitted that there is a difference of opinion in the medical field as to how to deal with pain management and that there is a group of pain management experts that believe pain medication can be used long-term to treat chronic pain. Dr. Haig stated that he did believe there was an injury to Claimant that caused him low back pain and that he did not think Claimant could return to work as a ship fitter. Dr. Haig also acknowledged that although he thought a cashier job would be suitable for Claimant, if the job required Claimant to go outside the physical restrictions discussed previously, Dr. Haig would not approve that job.

Dr. Haig also conceded that the last time he saw Claimant was November 2003 and he therefore could not offer an opinion as to Claimant's current condition. Dr. Haig testified that it was possible that when he saw Claimant for the second visit, Claimant was not in any acute distress because the pain medication that Claimant was taking masked the pain.

Dr. Haig explained that Dr. Allen's technique for reduction of narcotic pain medication is to substitute different sedatives for the narcotics that a patient is taking. Dr. Haig acknowledged that this is a form of pain management in and of itself.

Dr. Haig also stated that if Claimant had to bend down for long periods of time, for example to restock shelves, this could cause a flare up of Claimant's back; however, Dr. Haig did not think that Claimant would have random flare-ups that were not caused by some sort of trauma.

Dr. Haig also reviewed the July 30, 2002 MRI, which reported that Claimant had an annular tear. Dr. Haig stated that an annular tear could in and of itself cause pain, and that there is no surgery available to fix it, nature has to take its course and heal it with scar tissue. Dr. Haig stated that continued dosages of both vicodin and soma will make Claimant feel better, but will not improve his condition.

On redirect, Dr. Haig stated he has never prescribed narcotics for a patient for a period of over three years. In his opinion, it would not be medically feasible or good for the patient to prescribe narcotics to a patient for the rest of his life.

Dr. Haig reviewed the most recent MRI of Claimant taken on October 27, 2005. Based on this MRI and his review of other doctor reports regarding Claimant, Dr. Haig thought Claimant's condition was basically the same as it was at the time of his examination of Claimant on November 12, 2003. Dr. Haig stated that as of November 12, 2003 he thought it would have been good for Claimant to work.

On re-cross examination, Dr. Haig stated that different individuals have different thresholds of pain and that the only real way to determine an individual's pain threshold is to listen to what the patient says about their pain and how it affects their daily life.

Dr. Herbert Emejulu (EX 21)

Dr. Emejulu testified by deposition on January 11, 2006. He is licensed and practicing in Texas. He specializes in family practice and pain management[15] and also does pharmacological pain management which involves injections and nerve blocks. Dr. Emejulu stated that he has been practicing pharmacological pain management for three years.

[15] Dr. Emejulu does not state on his website that he is a pain management specialist; however, when questioned about his credentials on cross-examination, he explained that the American Medical Association has various boards, one of which is the American Physician of Pain Management (AAPM), and that he is credentialed with the AAPM.

Dr. Emejulu first saw Claimant on December 14, 2004. Dr. Emejulu testified that Claimant had previously been seeing another doctor, who was now no longer accepting worker's compensation patients. Worker's compensation approved Claimant's visit with Dr. Emejulu on December 6, 2004 and thereafter Claimant made his appointment.

Dr. Emejulu took a history of Claimant in which Claimant told him that he was employed at Sneed Shipbuilding and when he was moving some angle iron the iron fell back and Claimant injured his back. Claimant brought past medical records to Dr. Emejulu's office, and the information in those records was consistent with how Claimant stated he had been injured. Dr. Emejulu testified that Claimant brought an MRI, dated September 29[16], 2001, with him to this initial visit. The MRI showed moderate disk degeneration and mild posterior central disc bulge at the L4 and 5 level. Dr. Emejulu stated that these findings portrayed to him that Claimant's pain is real and that he did not make it up. Dr. Emejulu explained that this report indicated that the nerve root was involved and that is what transmits the pain.

Dr. Emejulu performed a physical examination of Claimant which indicated that the central low back was tender to palpate and that there was radiation of pain from the low back to the left lower leg or left lower extremity. Dr. Emejulu stated that this pain was consistent with the diagnostic studies and Claimant's complaints.

Dr. Emejulu was asked whether he had an opinion regarding whether or not Claimant's injuries were caused by his on-the-job injury at Employer's. He explained that he had no reason to disbelieve the history that Claimant presented and thus he though that Claimant's pain came from his injuries at work. At this initial visit with Claimant, Dr. Emejulu did not recommend surgery, instead he prescribed three medications, Soma, a muscle relaxer, Narco, a narcotic for the pain, and Mobic, an anti-inflammatory. Dr. Emejulu continued to see Claimant once a month following this initial visit and continued to prescribed the above medications for Claimant.

In addition to the medications, Dr. Emejulu wanted to have an additional MRI done; however, the process of pre-approval required by worker's compensation regulations took over a year to complete. Dr. Emejulu testified that the insurance company wanted him to reduce Claimant's medication so that Claimant could go back to work. Dr. Emejulu stated that this had bad results for

[16] Since this initial MRI, three more were conducted.

Claimant, and that any progress they had made was negated because Claimant came back to see him in much worse condition than before he reduced the medications.

Dr. Emejulu acknowledged that some doctors disagree about pain management as a means of treating chronic pain. Dr. Emejulu explained that chronic pain can be disabling and that some people need drugs to function. The goal of pain management is to get people to where they can function despite their pain. However, he testified that functional does not necessarily mean returning to the workforce, although that is his ultimate goal.

Dr. Emejulu testified that he did not think that Claimant could go back to work doing heavy manual labor at a shipyard, as he was doing before; nor did he think that at any time from the date of injury till the present was Claimant capable of returning to his old job. However, Dr. Emejulu did think that he could manage Claimant's pain and that Claimant was capable of being retrained to do something different. Dr. Emejulu would like to have another Functional Capacity Evaluation (FCE) done on Claimant.

Dr. Emejulu did not think Claimant had reached MMI and if he was able, would like to do further treatment with Claimant, including increasing his medications to keep him pain free and doing more physical therapy[17]. Dr. Emejulu stated that in his opinion Claimant would need lifetime pain management services because he believed that Claimant would continue to suffer from pain for his entire life. Dr. Emejulu did not consider surgery to be a treatment option for Claimant.

Regarding physical limitations due to Claimant's chronic pain, Dr. Emejulu testified that he did not think Claimant should lift, push or pull anything over one pound because this could cause Claimant more problems. He did think that Claimant could work sitting down with breaks and that he could walk for short distances when the pain was well-controlled. Dr. Emejulu testified that for patients such as Claimant, he expects that about once a week Claimant would not be able to get up and go to work due to Claimant having a "bad day" and increased pain. Dr. Emejulu recommended that, if Claimant were sitting, that he be able to stand up and stretch (for about 10-15 minutes) about every 90 minutes, and that if Claimant was walking around, he be able to sit down every hour or 45 minutes. Dr. Emejulu stated that he would advise Claimant against bending or stooping. Dr. Emejulu did

[17] Dr. Emejulu clarified on cross-examination that he would recommend additional treatment for Claimant of physical therapy, occupational therapy, an FCE and possibly nerve blocks. However, Dr. Emejulu did concede that all of these procedures had been done on Claimant.

recommend that Claimant try and do what he could around the house just to stay active.

On cross-examination, Dr. Emejulu was questioned regarding the MRI that Claimant had brought to his office for their initial December 14, 2001 visit. Dr. Emejulu was aware that his MRI was taken only a few months after the accident, and that others had been taken since that time, however, he had not seen any of these other MRIs. Employer's counsel showed Dr. Emejulu an MRI of Claimant dated July 30, 2002. Dr. Emejulu read the report and conceded that this MRI did not mention anything about the thecal sac or decreased signal intensity. However, on re-examination, it was clarified that this report did in fact at least mention the thecal sac; it also reported a tear in the annulus, which Dr. Emejulu stated could itself cause pain. Dr. Emejulu was next shown a third MRI taken on June 26, 2003 which reported mild bulging of the disc at L4 to 5, less pronounced that in the previous study of 2001. Again, Dr. Emejulu stated that this MRI report did not say anything about the thecal sac or decreased signal intensity.

A fourth MRI was taken, per Dr. Emejulu's request, on October 27, 2005 which reports bulging of the annular slash disc in the midline of the L4 to 5, no change from the previous MRI. At this point Dr. Emejulu recommended that Claimant have an FCE[18].

Dr. Emejulu was shown the FCE and hypothetically questioned regarding what type of restrictions he would place on an individual based purely on the FCE he was looking at. Dr. Emejulu stated that based on the FCE, without any evaluation of the individual, he would place less restrictions on that person than he placed on Claimant in his previous testimony. Dr. Emejulu stated that he would let this individual go back to work as a matter of fact, but that there would still be restrictions. He would not want the individual to operate machinery, but based on a typical factory, Dr. Emejulu thought the individual could be a gate man. He still would not recommend bending and would place lifting restrictions of not more than 50 pounds on the individual. Dr. Emejulu noted that he would let a person with that FCE return to light duty and possible medium duty.

Dr. Emejulu testified that he prescribed Claimant the amount of medication he was getting prior to Claimant coming to see him and prior to the amount being reduced by Dr. Satir. Dr. Emejulu prescribed four Somas a day, Narco four times a

[18] An FCE had previously been conducted in September 2004, three months before Dr. Emejulu started treating Claimant.

day and Mobic twice a day. Dr. Emejulu stated that he reduced Claimant's medication since then to about half that amount and he has not seen any improvement in Claimant.

Dr. Emejulu was next shown results from an EMG conducted on May 12, 2003. The EMG results were abnormal and demonstrated lumbosacral radiculopathy, which Dr. Emejulu agreed with. Dr. Emejulu stated numerous times that the EMG reported very bad findings which did not support Dr. Satir's recommendations for Claimant.

Dr. Emejulu was given a report to review by Dr. Haig, in which Dr. Haig notes that he is concerned that Claimant is addicted to narcotic medication. Dr. Emejulu testified that he disagreed with Dr. Haig's report on this point.

Dr. Emejulu acknowledged that when Claimant first presented to him, Claimant reported a recent injury of neck pain, low back pain and muscle spasm from a motor vehicle accident. Dr. Emejulu was next asked to review the FCE and hypothetically give his opinion of whether an individual with a medium duty work release, could perform certain jobs. Dr. Emejulu stated that he did not think janitorial work would comply with the FCE. He did think that an individual with a medium duty work release could work as a cashier or a bike assembler if he could sit down.

On re-examination, Dr. Emejulu noted that what was confirming about the EMG was that the results led Dr. Proffit to believe that Claimant had radiculopathy and that his pain was real. Dr. Emejulu reiterated that he believed it was Claimant's on the job injury that was causing his pain, not the motor vehicle accident mentioned on cross-examination.

Dr. Emejulu testified that he would not give an individual with an FCE rating similar to the one presented to him a medium duty release, but he would give them a light duty release.

Medical Records from Dr. Emejulu, December 14, 2004 (EX 25)

According to Dr. Emejulu's notations regarding his first visit with Claimant, Claimant stated that he had been through therapy, work hardening, and "the works" and only wanted treatment pharmacologically. Dr. Emejulu diagnosed Claimant with low back pain, radiculopathy, muscle spasm and degenerative disc disease. His treatment plan included having Claimant return as needed, counseling, and medication.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the Claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides a Claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant testified that on July 16, 2001 he injured his back at work while throwing angle iron. Claimant stated that he reported the injury to Employer the next day when Claimant was too sore to come into work. Both Employer's counsel and Claimant's counsel have stipulated that Claimant was injured on July 16, 2001 in the course and scope of employment and that the injury was reported on July 17, 2001. (JX 1)

Based on the facts and the party's stipulation, I find that Claimant has established a prima facie case of compensability with regard to the injury he suffered on July 16, 2001 in that he has established that he suffered a harm and that working conditions existed which could have caused the harm.

No evidence was offered to rebut this presumption. Thus, based on the facts and stipulations of the parties I find that Claimant's injury was one arising out of or in the course of his employment.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement (MMI) is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a Claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *La. Ins. Guaranty Ass'n v. Abott*, 40 F.3d 122, 29 BRBS 22 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979).

In the present case, the parties dispute whether Claimant has reached MMI. Employer argues that MMI was reached on November 12, 2003, the date of Claimant's second and last visit with Dr. Haig. Dr. Haig testified that Claimant was significantly improved from his prior visit on August 7, 2002 and he did not

think Claimant needed any further treatment beyond pain management. Dr. Haig stated that after this November 2003 visit, he believed Claimant could return to work with certain restrictions. Claimant on the other hand presents evidence that MMI has not yet been reached.

Dr. Emejulu, Claimant's most recent treating physician, stated that, if he was able, he would like to do further treatment with Claimant, including physical therapy, occupational therapy, possible nerve blocks, and additional medication to try and manage Claimant's pain. However, Dr. Emejulu conceded that these procedures had already been done. Dr. Emejulu also testified that due to insurance restrictions, he had lowered Claimant's daily amount of pain medication and that this had actually had a detrimental affect on Claimant. Dr. Emejulu stated that Claimant was doing better on his initial dosage of prescribed pain medication, and that as part of Dr. Emejulu's further treatment of Claimant he would increase or change Claimant's pain medication in order to help better manage Claimant's pain. Consequently, Dr. Emejulu did not believe Claimant to be at MMI.

I agree with Dr. Emejulu that MMI has not yet been reached. Although, Dr. Emejulu admitted that the procedures he would like to do on Claimant have already been done, that does not preclude a finding that MMI has not yet been reached. Claimant participated in physical therapy for a limited amount of time nearly three years previous to his treatment by Dr. Emejulu. Also, although it appears that Claimant received at least one epidural injection from Dr. Dumitri, the record is unclear as to whether or not additional injections were performed and whether or not these injections were beneficial. Also, I give Dr. Emejulu's opinion regarding Claimant's current condition more weight than that of Dr. Haig. Dr. Emejulu has been treating Claimant monthly since December 2004. Dr. Haig, on the other hand, has seen Claimant only twice, once in August 2002 and again in November 2003. He has not examined Claimant since that time and testified in his deposition that he could not offer an opinion as to Claimant's current condition. In opining that Claimant had reached MMI as of November 12, 2003, Dr. Haig emphasized the fact that Claimant appeared to be in no acute distress during his office visit. However, on cross-examination, Dr. Haig conceded that it was possible that when Claimant came for the second visit, Claimant was not in any visible distress because Claimant was taking pain medication that may have masked his symptoms.

Claimant also saw Dr. Satir[19] immediately following his injury and until September 2004. On February 27, 2003, after a visit with Claimant, Dr. Satir noted that an orthopedic doctor had recommended surgery for Claimant and did not think Claimant would improve without surgery. Dr. Satir commented that he too thought surgery might be an option since Claimant did not seem to be improving under Dr. Satir's care. Although the record does not elaborate on what this surgery would entail and why it was not performed, Dr. Satir's notation indicates to me that there were other options still available to Claimant at that time for further treatment. Consequently, based on the foregoing, I find that Claimant has not yet reached MMI.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A Claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen. dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

In the present case, there is no dispute that Claimant cannot return to his previous employment as a ship fitter. Both Dr. Haig and Dr. Emejulu testified that Claimant could not return to the type of heavy labor involved in ship fitting. Nor has any other physician that has treated Claimant indicated that he could return to his former employment. While both Dr. Haig and Dr. Emejulu did agree that Claimant could return to some type of employment, they placed limiting physical restrictions on Claimant. Therefore, Claimant has established a *prima facie* case of disability and the burden shifts to Employer to show the existence of suitable alternative employment.

[19] Dr. Satir did not specifically address MMI.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

In this case, Employer has offered numerous jobs since September 2005 ranging from light to medium duty work that it contends are suitable alternative employment for Claimant. Claimant, on the other hand, has offered evidence in the form of testimony by vocational rehabilitation counselor, Mr. Kramberg, that none of these jobs are suitable for Claimant based on his physical restrictions as well as the geographical location.

To briefly recapitulate Claimant's restrictions and his physicians' opinions on his ability to work: Dr. Satir, Claimant's first physician, who treated Claimant for over three years, released Claimant to return to work in September 2004 in accordance with an FCE that was conducted the same month. On its face the FCE indicated that Claimant was capable of either light or medium duty work. Dr. Haig and Dr. Emejulu on the other hand, did not think Claimant was capable of medium duty work and did not think Claimant had fully met the requirements for medium

duty work during his FCE. Ms. Rapant, the vocational rehabilitation counselor who was responsible for finding alternative employment for Claimant also expressed doubts about the FCE placing Claimant in the medium work category. Dr. Haig felt that Claimant should work within a 20 pound weight restriction and that Claimant should be careful of "bending, squatting or crouching in long positions --- in awkward positions." (EX 8, pg. 16) Dr. Haig also stated that Claimant could walk and sit without restrictions. Dr. Emejulu testified that he did not think Claimant should lift, push or pull anything over one pound because any more than that could cause Claimant more back problems. Dr. Emejulu did think Claimant could walk for short distances when the pain was well-controlled and that Claimant could work sitting down as long as he could take breaks for about 10-15 minutes for every 90 minutes of sitting. Dr. Emejulu advised Claimant against bending or stooping. Dr. Emejulu also predicted that Claimant would likely have a "bad day" once a week where he would not be able to go to work because of his condition.

Although Dr. Emejulu places much more restrictive physical limitations on Claimant than Dr. Haig does, I find that after reviewing all the evidence, Claimant is capable of work in the light category. Dr. Emejulu stated that he would prefer Claimant not to push, pull or lift anything over one pound. However, later in Dr. Emejulu's deposition he is asked a number of hypothetical questions based on Claimant's FCE. Dr. Emejulu stated that based on the FCE, without any physical examination of the individual, he would place less restrictions on that individual than he placed on Claimant. Dr. Emejulu testified that he would let the individual in the FCE return to light duty work. He would still not recommend bending and would place a 50 pound lifting restriction on the individual. Based on the FCE alone, Dr. Emejulu thought that a cashier job or bike assembler job would satisfy the physical restrictions indicated in the evaluation. Also, Claimant himself conceded to Ms. Rapant on their first meeting in June 2005 that he thought he could perform light duty work, and so testified again at trial.

Upon review of the labor market survey, Dr. Haig opined that as long as the lifting restrictions remained within 20 pounds, he felt that Claimant could work as a cashier, janitor, sales person, or laundry assistant. He specifically noted that Claimant should be capable of stocking shelves up to 20 pounds at a time. Although Claimant's counsel repeatedly focuses on Dr. Haig's restriction that Claimant not bend or stoop, according to Dr. Haig's deposition, he actually stated that Claimant should be careful of "bending, squatting or crouching in long positions --- in awkward positions." (EX 8, pg. 16) He does not seem to restrict Claimant from bending or stooping all together, but rather he encourages limited

bending or stooping. Also, Dr. Satir, who treated Claimant for over three years, released Claimant to return to work in 2004 based on the FCE, which at the very least included light duty work.

Notwithstanding Claimant's ability to work, however, I find Employer has failed to meet its burden of finding suitable alternative employment that is realistically available to Claimant.

Employer conducted extensive job searches that were limited to Beaumont, Texas. Claimant, however, lives in Orange, Texas, which is about a 30 minute drive from Beaumont. Claimant testified at the hearing that he does not have an automobile because it got repossessed after his July 16, 2001 accident. Claimant stated that he depends on his brother-in-law or friends to take him where he needs to go; however, Claimant did not know anyone that would be willing to drive him to Beaumont every day for work. When Ms. Rapant was questioned regarding the realities of Claimant working in Beaumont without transportation, she merely stated that carpooling or some other means of transportation might be available to Claimant. However, Ms. Rapant acknowledged that she did not know of anyone that was living in Orange that drove to any of the job locations listed in Beaumont.

The majority of Claimant's past employment has been in Orange, Texas. Claimant testified that he was born and raised in Orange and has lived in Orange his entire life. Although Claimant stated that he is able to get rides from his brother-in-law and from friends on occasion, it is not realistic to expect Claimant to be able to find someone to drive him back and forth to Beaumont five days a week for work. Consequently, Employer has failed to show the existence of realistically available job opportunities within the geographical area where Claimant resides that Claimant would be capable of securing if he diligently tried.

Accordingly, I find that Claimant has been temporarily totally disabled since July 16, 2001, the date of his accident.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5th Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990) (holding that 34.5 weeks of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular") . The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at the time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor

Workers' Compensation Act, §§ 10(c), 33 U.S.C.A. §§ 910(c). *New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028 (5th Cir. 1997)

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). *Hayes v. P & M Crane Co.*, *supra*; *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. *See Story v. Namy Exch. Serv. Center,* 33 BRBS 111(1999).

In this case, neither 10(a) nor 10(b) are applicable for calculation of average weekly wage. There are no records to indicate the exact number of days Claimant worked in the 52 weeks prior to his injury, nor is there any evidence of co-worker's salaries with which to compare Claimant. Therefore, since 10(a) and 10(b) do not apply, 10(c) is the appropriate method for calculating Claimant's average weekly wage.

The object of 10(c) is to arrive at a sum which reasonably represents the Claimant's earning capacity at the time of his injury. *See Story,* 33 BRBS 111. While Employer has suggested two possible methods for calculating Claimant's average weekly wage, neither of these methods account for the limited 28 weeks that Claimant worked in 2001 due to his injury. Claimant was injured on July 16, 2001 and thereafter did not return to work. It would be unfair to penalize Claimant for his injury by dividing his 2001 earnings by a 52 week year as Employer suggests. Employer also advances a calculation using Claimant's previous three years of annual earnings and dividing by 156 weeks. However, again Employer is using 52 weeks in 2001 instead of the 28 weeks that Claimant actually worked prior to his injury.

I agree with Claimant, and I adopt Claimant's assertion that a fair and accurate estimate of Claimant's annual earning capacity at the time of his injury can be calculated by focusing on the 28 weeks that Claimant worked prior to his injury. In 2001 Claimant earned $10,154.64 in the 28 weeks prior to his injury which equals an average weekly wage of $362.64. Claimant testified at trial that he had just started a new task for Employer that would probably have lasted through the end of 2001. Thus, this calculation accounts for Claimant's work year being interrupted by his injury and produces a fair estimate of Claimant's earning capacity at the time of his injury.

Medicals

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A Claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). The Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atl. Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996). If an employer has no knowledge of the injury, it cannot be said to have neglected to provide treatment, and the employee therefore is not entitled to reimbursement for any money spent before notifying the employer. *McQuillen*, 16 BRBS 10.

Section 7(c)(2) of the Act provides that when the employer or carrier learns of its employee's injury, it must authorize medical treatment by the employee's chosen physician. Once a Claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or District Director. *See* 33 U.S.C. § 907(c); 20 C.F.R. § 702.406. The employer is ordinarily not responsible for the payment of medical benefits if a Claimant fails to obtain the required authorization. *Slattery Assocs. V. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the Claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53; *Swain*, 14 BRBS at 664.

In the present case, Employer asserts that five Vicodin and five Soma per day are not medically reasonable or necessary for Claimant at this point in time. Employer requests that Claimant be weaned off of his pain medication all together, and at the very least that Claimant be limited to his current amount of pain medications. Claimant on the other hand maintains that his pain medication should not be monitored by the insurance company, and that he should be provided whatever treatment and prescriptions his doctor (Dr. Emejulu) recommends.

While Dr. Haig did testify that he believed Claimant should be weaned off of his pain medication, Dr. Haig also acknowledged that there are differing opinions in the medical field regarding pain management. He ascribes to the idea that pain management should not be used as a long term treatment. Dr. Haig also stated that he though Claimant's condition was permanent and that Claimant should learn how to deal with this condition. Dr. Haig acknowledged, however, that while continued use of pain medication would not improve Claimant's condition, it would make Claimant feel better.

Dr. Emejulu testified that he is of the belief that pain medication can be used to treat chronic pain indefinitely. He explained that chronic pain can be disabling and that some people need drugs to function. Dr. Emejulu stated that he believed Claimant would need lifetime pain management services. Dr. Emejulu also noted that since he had reduced Claimant's pain medication, Claimant's condition had worsened, and what progress they had made was negated. Claimant himself stated that when he was taking the higher amount of medication his pain level was at about a four out of ten and that it was bearable. However, on the reduced medication, Claimant testified that his pain level was at about an eight out of ten.

While Dr. Emejulu stated that he would want to increase Claimant's pain medication, he also explained that he wanted to perform additional treatment on Claimant, including physical therapy, occupational therapy and an updated FCE. Dr. Emejulu is Claimant's current treating physician and is the only physician to have examined Claimant within the past year. I find that Dr. Emejulu's opinions and recommendations for Claimant should be given more weight than Dr. Haig's, who only examined Claimant twice, the last time being in 2003. Accordingly, I find that Claimant is entitled to reasonable and necessary medical expenses as recommended by his treating physician, Dr. Emejulu.

Section 908(f)

Employer has requested Special Fund relief pursuant to section 908(f). Section 8(f) shifts part of the liability for permanent partial or permanent total disability and death benefits from the Employer to the Special Fund established by section 44. When an employee's disability or death is not due solely to the injury which is the subject of the claim, Employer can request Special Fund relief. In this case, Special Fund relief is not applicable because it applies only to permanent disability or death and Claimant was awarded temporary total disability. However, I do note that Claimant has yet denied any previous back problems.

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days after it has knowledge of the injury. 33 U.S.C. §914; *Jaros v. Nat'l Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988). In this instance, Employer controverted on October 6, 2003 (JX 1, pg. 1). Employer's counsel stipulated that Employer was advised of Claimant's injury on July 17, 2001 (JX 1, pg. 1). Therefore, Employer did not file a notice of controversion within 14 days of learning of Claimant's injury; however, Employer, as stipulated in JX 1, began paying temporary total disability on July 17, 2001 and continued through November 29, 2004, at a comp rate of $233.46. Consequently, since the amount of compensation paid voluntarily by Employer prior to controversion appears to be no less than the compensation here awarded, Employer is not liable for 14(e) penalties.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from July 16, 2001 and continuing based on an average weekly wage of $362.64;

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses resulting from Claimant's injuries of July 16, 2001;

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 16th day of May, 2006, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge